In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 442

ANDIMO PAPPADIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23–29) is reported at 346 F. 2d 5. The opinion of the district court (Pet. App. 30–35) is reported at 235 F. Supp. 887.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1965. A petition for rehearing was denied on June 21, 1965. On July 6, 1965, Mr. Justice Harlan extended the time to file a petition for a writ of certiorari to August 19, 1965, and the petition was filed on August 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

786-846—65

QUESTIONS PRESENTED

1. Whether a witness may be sentenced to imprisonment for two years upon a nonjury adjudication for contempt in refusing to answer questions before a grand jury.

2. Whether the two-year sentence was reasonable.

3. Whether petitioner may refuse to testify notwithstanding a grant of immunity because there is an outstanding indictment against him.

4. Whether, after having answered some questions under a grant of immunity, petitioner may refuse to answer others on the ground that the answers already given might subject him to a charge of perjury.

5. Whether the answers to questions asked of petitioner were protected by the attorney-client privilege.

6. Whether the questions which petitioner refused to answer were relevant to the grand jury's inquiry.

STATEMENT

Petitioner appeared pursuant to a subpoena before a grand jury of the Southern District of New York and refused, on the grounds of the privilege against self-incrimination, to answer questions other than some preliminary information (R. 97–109). During one of these appearances he was told that there had been testimony before a Senate committee and statements to law-enforcement officers that one Thomas Lucchese was the head of a group of people engaged in a number of illegal activities, including the illicit narcotics traffic, and that it had been alleged that petitioner was a member of that group (R. 102).

Thereafter petitioner was granted immunity under 18 U.S.C. 1406 and directed to answer the questions which he had previously refused to answer (R. 110–116). At subsequent appearances before the grand jury he declined to answer all but a few questions (as to name, residence and age), predicating his refusal on the First as well as the Fifth Amendment (R. 118–135). When the grand jury sought from the court an order directing petitioner to answer, his attorney called attention to the fact that petitioner was named as a defendant in an indictment returned in 1958 charging a conspiracy to violate the narcotics laws. The government conceded that fact and noted that petitioner had been severed before the case went to trial and that he had not been tried since that time[1] (R. 139–141). The court ruled that the outstanding indictment did not justify petitioner's refusal to answer since 18 U.S.C. 1406 expressly provides that the immunity it grants, both as to prosecution and as to use of testimony, relates to any criminal proceeding against the defendant in any court, so that "the testimony which is compelled may not be used against this defendant in any prosecution, whether based on a pending indictment or on an indictment that may hereafter be procured" (R. 143). The court directed the witness to answer all questions previously asked (R. 167).

Petitioner then appeared before the grand jury and answered a number of questions (R. 170–188). He

[1] The case against those who went to trial is reported as *United States* v. *Aviles*, 274 F. 2d 179, certiorari denied, 362 U.S. 974; see also the ruling on motion for a new trial, 337 F. 2d 552, certiorari denied, 380 U.S. 906.

was asked how often and where he had met Lucchese since he had been served with the grand jury subpoena, and petitioner replied that he had met him a few times on the street and that they had met with lawyers on a few occasions (R. 185–186). After consulting with counsel, petitioner refused to identify the lawyers or state who else was present at the meetings (R. 186–188). The judge, with petitioner's counsel present, was asked to rule on these questions (R. 190). The judge explained to petitioner that the attorney-client privilege applied to conversations between lawyer and client, but that the prosecutor had the right to ask when and where he met the lawyer, and whether anybody else was present (R. 201–202). Petitioner thereafter said that the meetings were in the afternoon and that they could have lasted a couple of hours, but he again declined to say where the meetings took place or who was present (R. 210–211).

An order was issued to show cause why petitioner should not be punished for contempt (R. 3–6). Petitioner, in his reply, claimed that he was not required to answer on the grounds that the questions were not relevant; that there was an outstanding indictment against him; that the answers already given might be the subject of a trial for perjury; and that answers to the questions would interfere with the attorney-client relationship (R. 7–32). Petitioner repeated these arguments at the hearing on the order to show cause (R. 33–46, 60–61). Petitioner demanded a jury trial (R. 34), but did not contest the fact that he had refused to answer the questions at issue (R. 51). The

court found petitioner in contempt for refusing to answer five questions (R. 74–75) [2] and sentenced him to imprisonment for two years or until further order of the court should petitioner answer the questions (R. 217–218). The court of appeals affirmed the conviction (Pet. App. 36–37).

ARGUMENT

1. The question whether the district court had the power to impose a sentence in excess of the petty-offense maximum for contempt for the witness' refusal to answer questions before the grand jury is before this Court in *Harris* v. *United States,* No. 6, this Term. The reasonableness of the sentence, assuming that there was power to impose it, may also be affected by decision in *Harris.* We therefore suggest that it would be appropriate to defer ruling on these issues until after the decision in *Harris.*

The other issues raised by petitioner do not warrant review by this Court:

2. The fact that there is outstanding against petitioner an indictment returned in 1958 does not excuse his failure to testify under a grant of immunity in 1964. Under that grant of immunity, nothing said in

[2] These questions are as follows:

"Mr. Pappadio, who are the attorneys who were present at these meetings?"

"Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?"

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?"

"All right; how many of such meetings were there?"

"Where did the meetings take place?"

response to the grand jury's questions in 1964 and no leads obtained therefrom may be used against petitioner in any trial. As the court of appeals observed, if petitioner "is required to give any testimony relating to the matters charged in the 1958 indictment, in response either to the questions now at issue or to subsequent questions, he could then move to have the indictment dismissed as to himself. And even if his answers are not such as to entitle him to dismissal of the indictment, he is protected against the answers being used against him in any criminal proceeding, including one under the pending indictment" (Pet. App. 27). The views expressed by two dissenting members of the Court in *Piemonte* v. *United States,* 367 U.S. 556, 565, that a grant of immunity is ineffective once an indictment has been returned, concerned the particular facts of that case, in which the indictment related to the same subject matter about which the defendant was asked questions under the grant of immunity. In the present case, the grand jury was not investigating the crimes which were the subject matter of the 1958 indictment, and the petitioner was not an "accused" in the current inquiry.

3. An immunity statute is not rendered constitutionally defective merely because the witness may be prosecuted for perjury committed while testifying under a grant of immunity. *Glickstein* v. *United States,* 222 U.S. 139. There is no merit, therefore, to petitioner's argument that his testimony denying allegations made by government counsel (such as petitioner's membership in the Lucchese group) might become the basis for a perjury prosecution if he

testified further to conflicting facts. If the possibility that one statement under oath might conflict with another statement made in the course of the same testimony would be sufficient to raise the danger of self-incrimination of perjury which petitioner asserts (Pet. 19), a witness in any civil or criminal proceeding could invoke the same claim after having given several answers under oath. A witness could, for example, under this theory, refuse to answer questions on cross-examination on the claim that those answers might be used against him on a perjury prosecution for testimony given during his direct examination. This is not, we submit, the sort of real hazard against which the privilege is designed to protect. Cf. *Hoffman* v. *United States,* 341 U.S. 479, 486–487.

4. The government did not contend, nor did the court below hold, that the grant of immunity resulted in a loss of any attorney-client privilege. In fact the court of appeals specifically stated that since "the policies served by the attorney-client privilege go beyond protection against self-incrimination, the privilege is not destroyed by a grant of immunity from prosecution" (Pet. 28). All that the court below held was that the inquiries which petitioner refused to answer—questions as to who was present and where the meetings took place—did not fall within the attorney-client privilege. See *Colton* v. *United States,* 306 F. 2d 633, 636–638 (C.A. 2), certiorari denied, 371 U.S. 951; *Goddard* v. *United States,* 131 F. 2d 220 (C.A. 5). If there are circumstances in which the disclosure of persons present at an attorney-client conference could breach the secrecy protected by the privilege, peti-

tioner made no showing that any of these circumstances were present here, nor did he even suggest that the meetings with attorneys in Lucchese's presence related to the kinds of discussions covered by the privilege.

5. The relevance of the questions at issue to the subject matter of the grand jury investigation is evident from the context of the questions. Petitioner was told at the outset that the grand jury was investigating the activities of the Lucchese group, including alleged illegal sales of narcotics. It was relevant to that inquiry to learn whether petitioner had had meetings with Lucchese after the inquiry started, when those meetings were held, and who was present at any meeting. On their face the questions satisfy the standards of pertinency governing Congressional committees, which are stricter than those applicable to grand juries. See *Blair* v. *United States*, 250 U.S. 273, 282; *United States* v. *Levine*, 267 F. 2d 335, 336 (C.A. 2), affirmed, 362 U.S. 610.

Respectfully submitted,

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SEPTEMBER 1965.

*In lieu of the Solicitor General who has disqualified himself.

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